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IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellant,

vs.

O. L. BUNN, doing business as BUNN ELECTRIC COMPANY, et al.,

Appellees

No. 333

OCTOBER TERM, 1931

BRIEF FOR APPELLANT, IN RESPONSE TO THE MOTION TO DISMISS THE APPEAL, AND ON THE MOTION TO AMEND AND MAKE AETNA CASUALTY & SURETY COMPANY A PARTY.

W. CALVIN WELLS,
L. BARRETT JONES,
CHARLES S. REID,
MAX F. GOLDSTEIN,
ARTHUR G. POWELL,
Attorneys for Appellant

Dickerson Printing Co., Atlanta

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BRIEF FOR APPELLANT, IN RESPONSE TO THE MOTION TO DISMISS THE APPEAL, AND ON THE MOTION TO AMEND AND MAKE AETNA CASUALTY & SURETY COMPANY A PARTY.

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1. *On the motion to dismiss because the surety on appeal in the Supreme Court of Mississippi is not joined as an appellant in this Court.*

We say, first, that this surety is neither a proper nor an indispensable party to the appeal; and, then, that if the Court should hold the surety to be a proper or necessary party, the surety has presented an application to be made party; that the

appellant and the surety on the bond to appeal to this Court have joined in a motion to amend the appeal by making the surety on appeal in the state court a party; and that this cures the omission.

The question whether a surety on appeal is a necessary party to an appeal sued out by his principal (in the absence of summons and severance) depends on his relation to the case and to the judgment appealed from.

Under the Mississippi statutes and practice the surety on appeal is not a party to the litigation. When the appellant fails to prosecute his appeal successfully, the court as a procedural matter includes in the judgment against the appellant a judgment against the surety on appeal. If for any reason the surety desires to challenge the correctness of his being included in the judgment, he must do so by some supplementary proceeding. He cannot appeal from the judgment as an original proposition. His liability on the judgment is contingent only.

Wilson v. City of Lexington, 153 Miss. 209; 119 So. 795.

Whether a judgment is such a joint judgment as that all parties against whom it is rendered must unite in the appeal depends not on the form of the judgment, but upon considerations of substance.

Hunrick v. Patrick, 119 U. S. 156; 30 L. ed. 396.

The New York, 104 Fed. 561.

Love v. Export Storage Co., 143 Fed. 1, 11.

Clarke v. Boysen, 39 F. (2d) 800, 821.

The nature of judgments rendered in the State of Mississippi and the relations of parties thereto is a matter of local law as to

which the decisions of the highest courts of that State are controlling. (Compare *Central Loan & Trust Co. v. Campbell Commission Co.*, 173 U. S. 84, 90; 43 L. ed. 623, 625). The Supreme Court of Mississippi has held (*Wilson v. City of Lexington*, 153 Miss. 209; 119 So. 795) that though an intermediate appellate court includes the surety on the appeal to that court in the judgment it renders against the appellant, that the surety on this first appeal is not a necessary party to a further appeal of the case to a higher court. The rule of joinder on appeal is the same in that State as it is in this Court, with the exception of the manner in which summons and severance is had as to a non-joining party. Hence, when the highest court of that State holds that a surety on appeal, against whom judgment has been rendered along with his principal, in pursuance of a rule of practice in that State, is not a necessary party to a further appeal by his principal to a higher court, it is a construction of the effect of judgments in that State—a construction that the relations of the principal appellant and his surety to the judgment are not joint but are severable; and that the relation of the surety to the judgment is not absolute, as it appears on the face of it to be, but is contingent only. The earlier case of *Thomas v. Wyatt*, 17 Miss. 308, cited by opposing counsel, was overruled in *Wilson v. Lexington*, supra.

"The scope and effect of a state judgment is peculiarly a question of State law."—*Kenney v. Craven*, 215 U. S. 125, 130; 54 L. ed. 122.

The U. S. Court of Appeals of the 5th Circuit, in which Mississippi is included, having before it the question of joinder on appeal, has also held, in a case involving principal and surety, that "judgments and decrees under the law of Mississippi are joint and several, and not merely joint."

National Surety Co. v. LeFlore County, 262 Fed. 325.

In *National Surety Co. v. Austin Machinery Co.*, 35 F. (2d) 842, 845, the Court of Appeals of the 6th Circuit, having before it for consideration a judgment rendered in a state court in Mississippi, held that under the laws of that State, judgments against principal and surety are not joint but are several.

In Mississippi the common-law rule as to joint contracts has been abolished by statute, so that all liabilities, by contracts, express or implied, including judgments are now several.

J. B. White's Garage v. Boyd, 149 Miss. 383; 115 So. 334.

Mississippi Code 1930, §§ 2027, 2028.

This is peculiarly so as to bonds on appeal; since all appellants do not have to join in the appeal bond, and judgment on appeal may be entered against the surety, though his immediate principal be held not liable, if liability is adjudged against any of the other appellants—thus showing a complete severability of liability.

Mississippi Code (1930) § 37.

Wise v. Cobb, 135 Miss. 673; 100 So. 189.

A joint judgment, if we look to common-law definition, is one in which if either party pays it off he is entitled to contribution against the others; and in a judgment against one as principal and another as surety no contribution ever exists. The principal, if he pays, cannot recover anything from the surety; and, if the surety pays, he can recover the entire amount from the principal.

However, whatever may be the rule as to joinder on appeal as to cases where principal and surety are sued in the same action, or as to cases where the sureties on bonds of certain

kinds, given pendente lite, have the right to be heard before judgment is rendered against them, neither reason nor precedent supports the proposition, that where, under statute or the rules of court, judgment is automatically and without further hearing rendered against the surety on appeal or similar bonds, the surety is a necessary party to an appeal from that judgment, where the appeal is solely on the merits of the controversy.

Perhaps the best reasoned case on this subject is that of *The New York*, 104 Fed. 561, in the U. S. Court of Appeals of the 6th Circuit (Judges Lurton, Day and Severens presiding; and all participating). The opinion is by Judge Lurton. The motion to dismiss the appeal was on the ground that the surety (on an admiralty bond) against which judgment was rendered automatically under the rule of court, was not joined. The motion to dismiss was overruled.

Judge Lurton first states the reason for the rule requiring joinder in appeal thus:

> "The principal is that the same controversy cannot come up in fragments. To make the doctrine applicable the *controversy* must be one to which there are two or more parties jointly interested as parties to the same *litigation*." (Italics ours).

It is pointed out that though (as in the case at bar) the judgment on its face is against the surety as well as against the appellant, that the surety, which in that case (as in the case at bar) was automatically included in the decree because of its obligation that the principal would comply with the judgment of the Court, was not a party to the controversy involved in the case; that that case (as is true of the case at bar) did not involve any question touching the obligation of the surety or in any way involving the terms of the stipulation of the bond.

Ex parte *Sawyers*, 21 Wall. 236; 22 L. ed. 617, is cited in the opinion and is distinguished by the fact that it involved the liabilities of the sureties and that it arose upon a rule issued against them.

In the course of the opinion, it is pointed out that the exact question arose in the Fourth Circuit in the case of *The Glide*, 72 Fed. 200; and that, on sound reasoning, it was held that the sureties were not necessary parties to the appeal; that their interests were merged into those of the appellant and represented by him.

An analysis was made of the case of *Estis v. Trabue*, 128 U. S. 225; 32 L. ed. 437; attention being called to the fact that the bond there given was a different kind of bond.

The learned judge further remarked very pointedly:

> "We fail to see any greater reason for regarding the stipulators, sureties in such a bond, as necessary parties to an appeal than there is for regarding the sureties in a cost bond as parties to the controversy."

The Court adds:

> "Undoubtedly, if the suit is upon a bond, and the judgment is against the surety as well as the principal, both must join. But the reason is that the bond and its obligation is then the thing in controversy, and constitutes the subject-matter of the litigation. To this class of cases the case of *Estis v. Trabue* belongs."

In thus distinguishing *Estis v. Trabue*, Judge Lurton doubtless had in mind the fact that the case arose in Mississippi, and while sureties on a claimant's forthcoming bond in attachment in that State are not allowed to participate in the litigation prior

to the time when liability is established against the claimant, still before judgment is to be renedered against them they are given opportunity to show in defense any reason they have why judgment should not be renedered on the bond.

See *Atkinson v. Faxworth*, 53 Miss. 733.

Atkinson v. Faxworth, 53 Miss. 741.

The judgment appealed from in *Estis v. Trabue* was, as Judge Lurton points out, a judgment in a suit, which was in substance a suit on the bond itself.

From the final decision of the Court of Appeals in the case of *The New York*, supra, (108 Fed. 102) the case went to the Supreme Court; and the Court rendered judgment affirming the judgment of the Court of Appeals. It is true that in the Supreme Court no notice is taken of the lower court's ruling on the motion to dismiss; but, since the point is one which, if well taken, is to be noticed by the Court on its own motion, the action of the Supreme Court in taking jurisdiction and deciding the case on its merits is indirect authority and physical precedent sustaining the ruling of the Court of Appeals on the question. This case on appeal from this decision of the Court of Appeals is found in 189 U. S. 363, 47 L. ed. 854 (sub nom. The Conemaugh in the official report and sub nom. *Union Steamboat Co. v. Erie & Western Transportation Co.*, in the L. ed.) Mr. Justice Holmes in *Erie R. Co. v. Erie & W. Transportation Co.*, 204 U. S. 220, 224, 51 L. ed. 450, 453, gives the history of the litigation including the ruling on the motion to dismiss.

In the case of *Columbia River Packers Association v. McGowan*,, 217 Fed. 196, by the Court of Appeals of the 9th Circuit, it is held that sureties on an injunction bond need not be joined in an appeal to the higher court from a judgment in

which they were included along with their prinicpal. There is a full discussion and analysis of the cases on the subject.

In the case of *Lamon v. Spear Hardware Co.*, 190 Fed. 734, (relied on by opposing counsel) the Court of Appeals of the 8th Circuit did dismiss an appeal because sureties on an intermediate appeal, who were included in the judgment, were not joined, but, later, the order of dismissal was vacated, and on reargument it was held (198 Fed. 453) that they were not necessary parties; and the motion to dismiss was denied. On the rehearing it is pointed out that the liability of the sureties arose on the appeal bond, while the liability of the appellant arose upon the original cause of action and that, therefore, though the judgment was apparently joint, it was not in fact so.

In *Hart v. Wiltse*, 16 F. (2d) 838, (U. S. C. A. 1st Circuit) it was held that one who was included in the final decree because of a stipulation filed by him to abide the decree rendered in the cause, was not a necessary party to an appeal prosecuted from that decree by another defendant who had litigated the question and against whom the same decree had been rendered.

One of the reasons given in *The Glide* (72 Fed. 200) as to why the sureties are not necessary parties to the appeal—that they are represented by their principal—is but a corollary of the propositions developed and announced in *Pease v. Rathburn-Jones Engineering Co.*, 243 U. S. 273; 61 L. ed. 715—that the sureties on appeal and similar bonds are only quasi-parties; that their relation to the case is not to conduct, control or participate in the litigation, but only to abide the result of it as conducted by their principals; that inclusion of them in the judgment or decree does not come as the result of judicial determination of issues of law or of fact, but merely as a matter of special contract; that no matter how many appeals are subsequently taken in the case, their contractual relation to it is not changed, they merely abide the final result, whatever it is.

This is in accord with what is said in *Babbitt v. Shields,* 101 U. S. 7; 25 L. ed. 820.

> "Where the bond is given in a subordinate court to prosecute an appeal to effect in a superior court, the sureties become liable if the judgment is affirmed in the superior court, nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination and a new bond is given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction but the reversal of the judgment in some court having jurisdiction to correct the alleged error."

Since such sureties, so related to the controversy, can neither assign error nor release error as to anything occurring on the trial of the case or involved in the judicial determination of the issues of which the judgment is the net embodiment, what good reason can exist for joining them in the appeal?

A surety not interested in the controversy on the merits cannot appeal, though included in the judgment.

Davis v. Preston, 280 U. S. 406; 74 L. ed. 514.

Suppose such a surety were asked to join in appeal and consented to do so, what error could he assign? What exception could he rely on?

If, as is said in *Ex parte Chetwood,* 165 U. S. 443, 461; 41 L. ed. 782, 788, "according to the practice in this Court, a writ of error (now appeal) has been treated rather as a continuation of the original litigation than the commencement of a new action," (citing *Nations v. Johnson,* 65 U. S. 195, 205; 16 L.

ed. 628, and *Cohens v. Virginia,* 19 U. S. 410, 5 L. ed. 292) how can one, whose function in the case is not to conduct litigation, but merely to abide the result of litigation, prosecute the appeal or join in prosecuting it or in shaping and controlling the litigation on appeal?

In the *Glide* case (72 Fed. 200) it is said that the surety need not be joined in the further appeal, because his interests are represented by his principal. In *Clinchfield Fuel Co. v. Titus* (4th Circuit) 226 Fed. 574, the Court refused to dismiss appeal for the non-joinder of certain persons alleged to be necessary appellants, on the ground that another person representative of their interest had been joined as an appellant.

On these and other similar considerations it would seem that, with the possible exception of cases where, under the practice in the particular court, opportunity to be heard is given the surety before judgment is rendered against him and some justiciable question has thus arisen as to the surety's liability, a surety on appeal would be neither a proper nor a necessary party to a further appeal.

An examination of the final judgment in this case (R. 75) shows that it consists of two distinct parts; the first wherein the judgment of the lower court is reversed as to Williamson Grier Company and affirmed against appellant as to other appelles. It is in this that the former judgment, on which the constitutional questions really depend—the judgment overruling the demurrer —is made final enough to support an appeal. It is from this judgment of affirmance, as it relates back to the prior judgment on the demurrer, that the appellant is now appealing. It is this part of the judgment in which inhere the constitutional questions which give this Court jurisdiction. Following the judgment of affirmance, the Court proceeds, as an administrative matter, to compute the principal, the interest, the damages and the

costs to which the respective parties are entitled. All this computation could have been delayed or could have been left to the lower court without robbing the judgment of its finality. It is only in this part of the judgment that the surety is mentioned. In this part of the judgment none of the appealable questions are involved. The separability of the judgment perhaps more clearly appears, when we realize that the case was ready for appeal by the present appellant the moment the judgment was affirmed; and if the Court had stopped there the surety certainly would not have been a necessary or proper party to the appeal; and that the Court had to end the controversy as to which the appellant was a party by a judgment of affirmance before it was authorized to render any judgment against the surety on the bond.

But even if the surety in such a case be a proper party to join with his principal in appealing to a higher court, he is not a necessary party, since the judgment, as against each, is based on separate considerations—the judgment against the principal being the result of the decision of justiciable controversies between him and the appellees; the judgment against the surety being the result of his stipulations in the bond, thus creating such a separability in the judgment as to authorize his principal to prosecute his separate appeal.

On reflection it may be seen that the surety's relation to the case and to the judgment is very analogous to the position of a co-defendant against whom a decree pro confesso or a default has been taken where the other defendant defends. The non-answering defendant merely stands by without right to participate in the trial, or to object, except or assign error on what is done on the trial, but if the answering defendant loses the case, is included in the judgment against him. It is held that in appealing from such a judgment the defendant who litigated need not join the defaulting co-defendants included in the same judgment.

Winters v. United States, 207 U. S. 564, 52 L. ed. 340.

Federal Intermediate Credit Bank v. L'Herrisson, 33 F. (2d) 841.

Clarke v. Boysen, 39 F. (2d) 800, 820.

On the point that surety on intermediate appeal is not necessary party to subsequent appeal we also cite *Evans v. Cheyenne Cement Stone etc. Co.*, 20 Wyo. 188; 122 Pac. 588, not because it is in any wise binding on this Court, but because of the excellence of reasoning on which it is based and because of the discussion of the cases in it.

However, if the Court should be of the opinion that the Aetna Casualty & Surety Company, which was the surety on the appeal to the Supreme Court of Mississippi, is a necessary or proper party, motions have been filed by it and by the appellant to make it a party; and the surety on the appeal to this Court has consented that its appeal bond be amended accordingly.

The case of *Inland & Seaboard Coasting Co. v. Tolson*, most frequently cited as authority for adding a plaintiff in error or appellant by amendment, is reported in 136 U. S. 572, and in 34 L. ed. 539. As may be seen by reference to the facts stated in the official report of the case, the precise question presented here was the subject of the ruling there. Upon the affirmance of trial court's judgment by the lower appellate tribunal, judgment was entered, under rule of court, against the appellant and his sureties on the appeal bond. The appellant appealed to the Supreme Court and did not join his sureties in the writ of error. Motion was made to dismiss on ground of this non-joinder and was granted. Later during the same term a rehearing was al-

lowed. At this hearing (the time for appeal having expired) the sureties asked that the writ of error be amended so as to make them parties. Over strenuous objection of the defendant in error, the order of dismissal was rescinded and the motion to dismiss was ~~granted~~ denied. The motion to amend the writ of error by the inclusion of the sureties was also granted.

The Court of Appeals of the 5th Circuit in the case of *The Mary B. Curtis*, 250 Fed. 9, dealing with a motion to dismiss because claimant's sureties on an admiralty bond had not been joined in the appeal, deemed itself bound by an old precedent in the same court, to hold that the sureties should be joined; but, the sureties having voluntarily appeared and asked that they be made parties, though the time for appeal had expired, the Court made a comprehensive review of the authorities and granted the motion to make the sureties parties and denied the motion to dismiss.

See also the case of *The Seguranca (Dixon v. Howe)*, 250 Fed. 19.

Such an amendment, making admiralty sureties parties to the appeal, to obviate motion to dismiss for non-joinder, was allowed by the Court of Appeals of 8th Circuit in *The City of Naples*, 69 Fed. 794.

In *Hart v. Wiltse*, 16 F. (2d) 838, it was held that the making of necessary parties to the appeal within the time for appeal was not jurisdictional and that necessary parties could be added after the time for appeal had expired. See also *Rininger v. Puget Sound Electric Ry.*, 220 Fed. 419; *Hill v. Western Electric Co.*, 214 Fed. 243.

In the recent case of *Kelly v. Allen*, 49 F. (2d) 876, the Court of Appeals of the 9th Circuit held that the voluntary ap-

pearance in the Court of the omitted co-appellant prevented granting of motion to dismiss for the non-joinder.

II. *Pleadings and Proof Present Constitutional Question.*

We are not quite sure that we understand what point the appellees are making, in this division of their motion.

If the point be that the pleadings before the Court do not disclose a federal question with requisite certainty, it seems necessary only to call to the attention of the Court that the constitutional question involved in this case arises by direct attack on the constitutionality of the statute; this Court's jurisdiction being invoked under Division (a) of 28 U. S. C. A. § 344 (Judicial Code § 237) and not under Division (b) of that section. The demurrer in this case certainly drew in question the validity of the state statute on the ground of its being repugnant to the U. S. Constitution; and the decision of the state court was certainly in favor of its validity; and that gives jurisdiction—the question not being frivolous.

If the point be that the entire record is not here, it is covered by Rule 10 (former Rule 9).

By an inspection of the printed transcript it will be seen that the appellant served and filed its praecipe for such parts of the record as were material to the constitutional questions it was making. The appellees, or some of them, filed their praecipe calling for additional record, the materiality of which we do not see.

If the appellant had specified and caused to be sent up the entire record, consisting of seven large volumes, this Court would very properly have taxed it with the great cost involved. *Texas & Pacific Ry. Co. v. Leatherwood*, 250 U. S. 478; 63 L. ed. 1096.

The constitutional attack having been made by demurrer to the original bill, and the rights of all parties being necessarily dependent on the validity of the statute on which the bill is based, and under the provisions of which the action was brought, it is unnecessary that the whole record be before this Court, which is concerned only with the constitutional questions.

III. *On the Point that the Appeal Involves No Federal Question.*

The question of the jurisdiction of this Court to pass on the questions the appellant has made by its assignments of error has been fully discussed in the jurisdictional statement filed under paragraph 1 of Rule 12, and in the briefs on the case generally which have already been filed.

However, since opposing counsel are relying on cases such as *Ramsey & Gatlin Construction Co. v. Vincennes Bridge Co.*, 283 U. S. 796; 75 L. ed. 1420, and making the point that where a state court has held that, under its statutes, a bond or other contract is to be given a certain construction and effect, the federal courts are bound by that construction, we wish to reply that manifestly this rule does not militate against the party, whose contract has been construed as being under the statute, from attacking the statute, as thus construed and applied, as being repugnant to the Constitution of the United States.

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction, as to which there is a distinct and timely insistence that if so applied the statute was void under the Federal

Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable."

Fiske v. Kansas, 274 U. S. 380; 71 L. ed. 1108.

W. CALVIN WELLS,
L. BARRETT JONES,
CHARLES S. REID,
MAX F. GOLDSTEIN,
ARTHUR G. POWELL,
Attorneys for Appellant.

Of Counsel.